Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Network/Affiliate Programming Practices	)	MM Docket No. 95-92
	)	
Revision of Programming Policies for Television Broadcast Stations	)	

COMMENTS
OF
NATIONAL BROADCASTING COMPANY, INC.

Richard Cotton
Ellen Shaw Agress
National Broadcasting
Company, Inc.
30 Rockefeller Plaza
New York, NY 10112

Howard Monderer
National Broadcasting
Company, Inc.
11th Floor
1299 Pennsylvania Ave., NW
Washington, D.C. 20004

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National Broadcasting Company, Inc. ("NBC") by its attorneys, hereby files its Comments on the Notice of Proposed Rule Making in this proceeding ("Notice").

I. INTRODUCTION AND SUMMARY

In light of current market conditions, trends in the video marketplace, and the degree of present and foreseeable competition not only among a growing number of broadcast stations and networks but with other types of video program distribution, the time has come for the Commission to stop micromanaging the relationship between broadcast television networks and their affiliates. Broadcast networks and their affiliates today stand as equal partners in an ongoing business relationship. Each is critically dependent on the other for the success of that business. Neither party "dominates" the relationship. There is no public policy justification for regulations that restrict the ability of networks and affiliates freely to negotiate the terms of their relationship.

NBC is committed to a constructive relationship with its affiliates that works to the mutual benefit of the NBC Television Network and local stations. NBC recognizes that each affiliate does have the ultimate responsibility for what it broadcasts, and believes that, as in radio networking, that obligation can be incorporated into their relationship without FCC interference or micromanagement. In fact, an affiliate's decisions to affiliate with a network and to enter into agreements with other program suppliers are themselves exercises in licensee responsibility.

NBC's relationship with its affiliates is predicated on NBC's belief that strong local stations serving local communities are essential to the long term viability of the network business. The success of NBC's relationship with our affiliates is reflected in our ongoing dealings with the NBC Affiliate Board and with individual stations across the country. NBC's position in these Comments that it is neither necessary nor appropriate to retain government rules that regulate the network/affiliate relationship should in no way be read to mean that NBC is seeking to change the relationship between our affiliates and us, either in terms of our day-to-day dealings with local stations or in terms of the long term agreements we have recently concluded.

The marketplace conditions which impelled the Commission to adopt what are essentially the current rules were those that existed in radio in 1941. As the Notice points out, the rules were applied to television in 1946 without analysis or comment. About ten years later, in the early days of television networking, several additional restrictions were adopted. Thus, the rules that govern the relationship between television networks and affiliates were adopted at least 40 years ago, largely for a different medium, and in response to a marketplace in which there were many fewer stations, no competing video programming distributors, fewer broadcast networks, no cable networks, almost no independent program suppliers and a comparatively small advertising base -- in short, a totally different marketplace than the one that exists today.

The television broadcast industry has reached the point where both networks and affiliates have many choices, and that has meant more choices for viewers. There can be no doubt that had the current marketplace existed when the network/affiliate rules were first being considered, they would never have been adopted. Indeed, fifteen years ago, when the marketplace was not nearly as competitive and diverse as it is today, the Commission's own independent Network Inquiry Special Staff recommended elimination of almost all of these rules as contrary to the public interest.

No single network company dominates any market. The era in which it could be alleged that networks dominate their affiliates has long since passed. The recent upheaval in network-affiliate relations, in which at least 68 stations changed affiliation in less than a year and networks had to increase their compensation to affiliates by 50%, is compelling evidence of the shift in network-affiliate bargaining power.

Although it will no doubt be psychologically difficult, after more than 50 years of working in an industry subjected to these rules, for some to adapt to working in an unregulated competitive marketplace, there is no longer any conceivable _public_ interest reason for the Commission to continue to micromanage relations between broadcast television networks and affiliates. While certain of these rules may confer short-term, minor benefits on one or another entity in its contract negotiations, the Commission should not be regulating that bargaining process unless it can truly conclude that interference really does serve the _public_ -- not some private -- interest. Given the state of today's marketplace and future trends, only the contrary conclusion can be reached.

These Comments will first discuss the television marketplace and then turn to each of the rules which is the subject of the Notice.

II. REPEAL OF THE NETWORK/AFFILIATE RULES WOULD BE CONSISTENT WITH A GROWING BODY OF COMMISSION PRECEDENT ELIMINATING OUTDATED AND UNNECESSARY REGULATION OF BUSINESS RELATIONSHIPS

Repeal of the network/affiliate rules would be entirely consistent with what is becoming a significant body of analysis and precedent supporting elimination of outdated restrictions on broadcasters' commercial relationships and practices. These prior analyses and decisions have in common the recognition that while diversity, competition and localism remain important Commission policy goals, rules adopted decades ago, in a completely different marketplace environment, are no longer the way to achieve them. Indeed, in today's competitive environment, these rules are largely counterproductive.

As long ago as 1977, the Commission concluded that its almost identical rules governing radio networking were no longer necessary in view of the marketplace changes which had occurred in that industry since the rules were originally adopted in 1941. Network Broadcasting by Standard AM and FM Stations, 63 FCC 2d 674 (1977). There, the Commission compared the 660 radio stations in 1941 with the thousands in 1977; the more numerous radio stations in the major markets; the increased number of radio networks; the greatly lessened economic importance of radio networks; and the change in the kinds of program service offered by the radio networks (63 FCC 2d at 677-78). The Commission reviewed the arguments of various parties who urged retention of some of these rules, but concluded that all but the territorial exclusivity rule should be repealed. It said:

> "While there may be some substance to these arguments, in our view the weightier arguments are those of ABC and NBC, urging repeal. They assert that, under present circumstances vastly different from those dealt with in the Chain Broadcasting Report 35 years ago, these regulations are unnecessary, simply because (under these vastly different circumstances and with sharply reduced "network dominance"), the abuses and practices dealt with are unlikely to develop to any substantial extent. . . . Moreover, even if undesirable situations develop in a few cases, these will be so small in light of the vastly increased number of stations, and the greater number of networks that no significant harm to the overall public interest would be expected.
>
> There is the additional consideration with respect to some of the present rules, though probably not all of them, that their presence on the books may serve as a deterrent to the development of new and innovative radio network efforts and entities." (63 FCC 2d at 679)

These considerations apply equally to support repeal of these rules as they apply to today's television marketplace.

It has taken the Commission almost two decades to apply to television the reasoning that led to the elimination of the radio network/affiliate rules. The genesis of Commission reexamination of the network/affiliate rules as applied to television was the 1980 Report of the Commission's Network Inquiry Special Staff ("NISS"). After the most comprehensive study of television networking that had ever been conducted, the NISS concluded that all the network/affiliate rules (with the possible exception of the rule on territorial exclusivity) should be repealed (Network Inquiry Special Staff, <u>New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Final Report</u>

(October 1980)("Network Inquiry Report"), Vol. I, pp. 475-505). While the NISS discussed each of the rules at greater length, the following excerpt summarizes their conclusions:

> "[T]he rules do nothing to promote competition. The number of networks with which a broadcast station may desire to affiliate and the number of stations available for affiliation to a network are unaffected by the rules. The array of affiliation choices available to both network and broadcast stations remain unaltered. Without any change in either the number of networks or the number of stations, the Commission's goal of increased diversity is in the main not fostered by the rules, since the number of viewing options available to the public at any given time has not been increased....
>
> [N]either are the goals of community localism or individual localism furthered by the rules. The array of network and non-network alternatives confronting individual broadcast stations is not affected by the existence of the rules. If a station chooses to affiliate with a network, it is because the station finds network programs to be more profitable than its non-network alternatives. If a locally-originated program is more profitable to exhibit than its network counterpart, the network will not pay the affiliate to clear the network program because to do so would reduce the total profit from network program exhibition.
>
> Finally, if the Commission believed that limiting the contractual constraints networks may impose on their affiliates would further the Commission's goals be reducing affiliates' clearances of network programs, that belief was based more on fanciful supposition than fact. At most, this group of Commission rules has reduced prime-time clearances by 5 percent. The minimal impact of the rules on affiliate clearances is not surprising in light of the incentives both the networks and their affiliates have to maximize the joint profits from network exhibition and in light of the generally more profitable nature of network programs, attributable to the efficiencies of networking. Given the generally greater profitability of network programs, the networks have incentives to avoid the impact of these regulations on program clearance levels by devising other terms which do not violate FCC rules and which serve, perhaps less efficiently (i.e., in a more costly fashion), to

> generate the profit-maximizing number of clearances." (at p. 484-485)

Despite the NISS' conclusion that the network/affiliate rules did not advance any of the Commission's public interest objectives, it was not until 1989 that the Commission eliminated for television one of the rules that had been adopted in the 1940's, the rule that limited affiliation agreements to a maximum of two years. Network Affiliation Agreements (Two-Year Rule), 4 FCC Rcd 2755, 66 RR 2d 190 (1989). Reviewing the marketplace changes since that rule was adopted, the detriments of the rule and the benefits from its repeal, the Commission concluded:

> "In addition to the effects of this rule on new networks, we believe there is considerable public benefit in acting to facilitate those developments that will assist existing affiliates and networks in synchronizing their economic and competitive interests and will aid their effective participation in the increasingly diverse and competitive video marketplace of the future.
>
> Before turning to the details of the analysis that lead us to these conclusions, it should be helpful to review briefly the context in which present day networking takes place. In 1946, one year after adoption of the rule, there were just six television stations authorized and on the air, with one additional construction permit holder operating intermittently. In contrast, the Commission has now authorized more than 1600 full power television stations and more than 1300 of these, including more than 1050 commercial stations, are on the air. Of the commercial full-service stations, well in excess of 300 are not affiliated with one of the three major national commercial television networks. Of these "independents," approximately 25 are affiliated with the Home Shopping Network, 13 are affiliated with the Univision Spanish-language network, and 120 receive programming from the Fox Broadcasting Company.
>
> Cable television, non-existent in 1945, now reaches 54.8% of all television homes, with the number of subscribers now at 49.5 million. The number of cable television systems has increased from 70 in 1952, one of the earliest years from which figures are available, to over 8,500 in 1988; more than eighty percent of all homes receiving cable television

> have access to 30 or more channels of programming and about eighteen percent can receive 54 or more channels. Certainly there is ample evidence that new networks can flourish by serving this growing industry. The first of the satellite delivered cable networks did not commence national distribution until 1976. Today there are already over 85 national cable networks, many of which serve millions of viewers.
>
> This growth in network services for both broadcast and cable video outlets substantially mitigates the importance of rules governing the length of network affiliation contracts. The data on the growth of non-broadcast participants in the market have an added importance as a reminder that in focusing on how best to use the regulatory process to mediate the network broadcast station relationship, it is critical that regulations, like the "two-year" rule, not adversely distort the competitive interplay between broadcast networks (and their affiliates) and the newer cable networks (and their affiliates). The broadcast networks and their affiliates now face, and will increasingly face in the future, the need to compete aggressively both for programming and for viewers with non-broadcast networks. Elimination of this Rule thus could be of considerable importance to strengthening the ability of broadcast network-affiliates to respond to the competition from new technologies.
>
> . . . given our concern that the Rule is likely to have negative effects at least in some contexts and the likelihood that affiliation length will be but one term in a complex contractual relationship that will likely result in different terms for different types of stations and networks, we believe that the preferable course is to give the parties freedom to negotiate what they mutually agree to be the most efficient arrangement in their individual circumstances." (4 FCC Rcd at 2756-2757)

Although the same reasoning applies equally to the other regulatory restrictions on network/affiliate relationships and contract terms being examined in this proceeding, scrutiny of the other network/affiliate rules did not begin until this year, when this Commission took the appropriate and long overdue step of calling for their review in light of the even more diverse and competitive marketplace of 1995. However, the Commission has recently examined and eliminated two other antiquated limitations on the business activities of the original broadcast networks (the Prime Time Access Rule and the Financial Interest and Syndication Rules), in decisions that were predicated on the dramatic changes that have occurred in the television marketplace. In 1993, the Commission again examined the television marketplace, in terms of the program sources available to stations. Evaluation of the Syndication and Financial Interest Rules, 8 FCC Rcd 3282 (1993) ("Fin/Syn"):

> "The decline in network share [of audience, TV advertising revenues, and entertainment programming expenditures] is attributable, in large part, to the emergence of other viewing options, including a new network, independent television stations, and cable television networks. Each of these alternatives represents not only a source of diversity for viewers, but an additional market opportunity for program producers. In particular, we now agree that the overall demand for programming in the broadcast and cable marketplace limits a network's ability to control the market or dictate prices for prime time entertainment programs. Moreover, the demand by non-network outlets for programming comparable to that licensed by the networks for prime time exhibition is continuing to expand. This is the result of a number of factors. While the number of network affiliates has remained fairly constant, Fox has emerged as a fourth network. It broadcasts prime time programming, including series and movies, similar to that of the other national networks. Further, the number of independent stations has grown from 129 in 1980 to 380 in 1992. The number of cable networks went from 34 in 1982, and 100 in 1993. As a result, more than half of all households now receive 10 over-the-air stations and, when cable services are included, a total of 30 channels of television programming.
>
> We also note that an increasing amount of entertainment series programming is being sold directly to local stations in the first-run market. Contrary to the Coalition's claim that network distribution is necessary to create quality programming capable of successful syndication, studios are producing an increasing number of "network quality" programs for the first-run prime time market."(8 FCC Rcd at

3304-3305)

In Prime Time Access Rule ("PTAR"), 78 RR 2d 1076 (1995), the Commission concluded that in 1995 the three original networks and their affiliates do not dominate the national or local programming marketplace:

> "There are large numbers of sellers and buyers of video programming. Entry, even by small businesses, is relatively easy. There are a substantially greater number of broadcast programming outlets today than when PTAR was adopted in 1970 due to the growth in numbers of independent stations. In addition, non-broadcast media have proliferated. Viewers can choose from program offerings on cable, so-called "wireless" cable, satellite television systems, and VCRs. (78 RR 2d at 1077)...
>
> We thus conclude that, even focussing narrowly on local broadcast video programming distribution, the three networks and their affiliates cannot singly or jointly dominate video program distribution in the Top 50 PTAR Markets. This is a strong conclusion because the inclusion of additional television alternatives such as cable, satellite systems, video dialtone, etc. would serve to make domination by the networks and their affiliates even less likely." (78 RR 2d at 1083).

In short, there has been frequent and growing recognition by the Commission that in today's competitive environment rules regulating network relationships adopted decades ago are no longer necessary and are indeed counterproductive.

III. CURRENT MARKETPLACE CONDITIONS DO NOT JUSTIFY GOVERNMENT REGULATION OF THE RELATIONSHIP BETWEEN BROADCAST NETWORKS AND AFFILIATES

A. The Network-Affiliate Relationship In 1995

In May, 1994, the Fox/New World deal, in which several affiliates switched from one of the three original networks to

Fox, sent shock wave throughout the network business that changed the dynamic of the network/affiliate relationship. In the affiliate bidding wars that ensued, at least 68 stations changed affiliation in 37 markets, and in the ensuing negotiations between many affiliates and networks it is estimated that the three original networks agreed to pay $200 million or more in additional station compensation to attract or hold affiliations.[1]

Shortly after the Fox/New World deal was announced, NBC commenced negotiations with virtually all its affiliates in a setting where local stations had clear alternatives to becoming or remaining affiliates of NBC. As of today, we have reached 7 to 10 year agreements with stations covering close to 80% of U.S. television homes at substantially higher compensation rates. Under the new agreements, NBC has for the first time committed to providing programming for the length of the station's affiliation in specific time slots -- a commitment to make enormous investments in entertainment, news and sports programming for many years to come. In return, the affiliate's clearance obligations are spelled out with more precision, giving NBC some assurance of the clearances it needs to support the enormous cost of acquiring programming, such as the $1.2 billion committed to the 2000 and 2002 Olympic Games, and producing programming, such as the $300 million-plus NBC spends each year for NBC News.

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[1] Broadcasting & Cable, December 19, 1994 at 34.

These were normal, market-driven, commercial negotiations. They were successfully concluded in a manner acceptable to both parties. The process, which we assume was mirrored in the negotiations between local stations and the other networks, resulted in substantial commitments on both sides to the network/affiliate system. The process is also indicative of the relatively equal bargaining strength enjoyed by affiliates and their networks today, and demonstrates that we share a number of important goals for the network/affiliate system, including the strongest possible local stations and the largest possible audience for network programs.

B. The Marketplace Today Is Drastically Different From the One that Prompted Adoption of the Rules

The television industry, and particularly the relationship between networks and stations, is today completely different from what it was when the network/affiliate rules were adopted. Indeed, the rules were first adopted for the radio industry in 1941 (the year the first commercial television station was authorized) and were merely applied to television in 1946 -- before television networking began -- without additional analysis or comment (Notice, ¶2).

The Commission's 1941 Report on Chain Broadcasting (Docket No. 5060, May 1941) ("RCB") makes clear the concentrated marketplace conditions in radio that the Commission believed warranted regulation of the network/affiliate relationship: there were then only two dominant radio network companies (NBC and CBS); they and their owned stations accounted for more than half the total revenues of the entire industry and about half the entire industry's net operating income (RCB, p. 33); their affiliates operated with 86.6% of the total nighttime wattage of the unlimited time stations in the United States;[2] more than half of all the full-time stations in the country were affiliated with CBS or NBC; of the 92 largest U.S. cities, fewer than 50 had three or more full-time stations, and fewer than 30 had four or more (RCB, p. 51); and of the 30 clear channel stations, 28 were owned by or affiliated with CBS or NBC (RCB, p. 51).

By the mid-1970's these marketplace conditions had disappeared for radio, causing the Commission to eliminate the radio network/affiliate restrictions it had adopted 35 years earlier.

At the time of the Barrow Report[3] in the late 1950's, the comparatively young television marketplace was also much different than it is today. There were only three broadcast

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3 In addition, they shared with the Mutual Network affiliates operating with 5% of the nighttime wattage. RCB p. 31.

4 Network Broadcasting, Report of the Network Study Staff to the Network Study Committee (Oct. 1957) reprinted in Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1297, 85th Congress, 2d Sess. (1958) ("Barrow Report").

networks -- CBS, NBC and ABC -- which accounted for close to 70% of all national television time sales, with CBS and NBC accounting for over 60% (Barrow Report, pp. 181, 205); during the three prime evening hours, the three networks accounted for almost 78% of the total programs carried by all the commercial stations in the country (Barrow Report, p. 205); there were 431 television stations on the air, only 35 of which were not affiliated with one of the three networks (Barrow Report, p. 214); of the 233 television markets, only 16 had more than three television stations and only 53 had more than two stations (Barrow Report, p. 187). Thus, local stations were critically dependent on the three national networks as a programming source; and a hypothetical fourth network would then either have had to confine itself to the 16 markets where there were four or more stations or compete with the other three networks for access to their affiliates (Barrow Report, p. 188).

Today, the television marketplace is radically different. There are six commercial national television broadcast networks: ABC, CBS, NBC, Fox, United Paramount ("UPN") and WB, plus two with significant coverage of the national audience, Home Shopping and Univision. Fox has over 150 affiliates (plus over 40 secondary affiliates) and reaches 97% of U.S. television homes; UPN has 96 affiliates and reaches 83% of U.S. television homes (including secondary affiliates); and WB has 47 affiliates plus superstation WGN-TV, and reaches 78% of U.S. television homes (including secondary affiliates) (PTAR, 78 RR 2d at 1078).

There is, in addition, a vibrant syndication market providing programming to both affiliated and non-affiliated stations. In 1994, television stations aired 259 different programs supplied by syndicators, which were packaged and distributed by over 48 separate companies. First-run programming accounted for 75% of these shows, including over half of the 50 syndicated programs with the largest weekly gross market share. An Economic Analysis of the Prime Time Access Rule, submitted by Economists Incorporated in MM Docket No. 94-123, March 7, 1995, pp. 17-18.

As of January 1, 1995, there were 1,532 television broadcast stations in the U.S., including over 450 not affiliated with ABC, CBS or NBC. In 1994, the Top 50 markets had 278 stations not affiliated with the three original networks, or, on average, five to six per market (PTAR, 78 RR 2d at 1083).

The impact on broadcast networks and their affiliates of increased competition from both alternative sources of broadcast programming and newer distribution outlets such as cable, DBS and wireless cable, can be seen in the steady erosion of the viewing shares of the three original networks. The Commission concluded in its PTAR decision:

"It is thus clear that...the three original networks

> and their affiliates face more competition for viewers than they did in 1970 or even in 1980. The effects of this competition are readily apparent in examining the networks' audience shares over the years. Looking at prime time alone, the time period when the networks' viewing shares are the highest, each network's average share of the prime time audience declined from a 31.1 viewing share during the 1971/72 season to a 20.2 share during the 1993/94 season, a loss of almost one-third of each network's audience. ABC, CBS, NBC, and Fox had individual 1993/94 prime time audience shares of 20.1, 22.7, 17.8, and 11.4 percent, respectively. The Commission's calculation of affiliate audience shares in each of the Top 50 PTAR Markets is consistent with network audience shares nationally...
>
> Thus we conclude that, even focussing narrowly on local broadcast video programming distribution, the three networks and their affiliates cannot singly or jointly dominate video program distribution in the Top 50 PTAR Markets." (78 RR 2d at 1083)

There clearly is an abundance of alternative program sources available to every local station. The increase in recent years in the number of independent broadcast television stations is vivid testimony that there is ample programming available to them to fill their broadcast hours. For stations in every market, there are at least eight potential commercial network possibilities, and beyond that there are a plethora of programs available to fill the schedules of stations with no network affiliation.

The increase in the number of broadcast stations and other distribution outlets has also eliminated what was formerly perceived as a three-network "bottleneck" between program producers and viewers. The recent increase in the number of broadcast television networks demonstrates that there is no artificial barrier to entry into networking, as there was in 1941 in radio and in the 1950's in television. And the steady growth of the syndication and cable network markets proves that network distribution is no longer the sine qua non of successful programming. There is no valid basis for government interference in such an abundant marketplace.

C. The Networks Do Not Have The Ability To "Dominate" Their Affiliates

The network/affiliate rules were based on the belief that in the radio marketplace as it existed in 1941, competition was restrained because stations could not survive unless they were affiliated with NBC or CBS. They had no other choice. Today, stations become affiliates because among the choices open to them they freely choose to carry the program service of a particular network; networks agree to affiliate with a station because, among the choices open to them, they freely choose to reach the public in that market through that station. The existence of these choices has had a profound effect on the network/affiliate relationship, as is graphically demonstrated by the affiliate switches and new network/affiliate agreements described in Section A, above. The events of the past 16 months are eloquent testimony to the current, reasonable balance of bargaining power between networks and their affiliates.

Once a station chooses to become an affiliate of one of six commercial broadcast networks, it is likely to clear most network programming because it is generally of much higher quality relative to cost than alternative programming the station could obtain. As the NISS recognized 15 years ago, network programming is a more cost effective way to attract audiences. It is the quality of network programming relative to price, not some exercise of "control" or "dominance" by the networks, that is responsible for stations affiliating with networks and for their high clearance rates of network programs.

Clear evidence of the lack of network "control" or "dominance" over affiliates is found in the daytime periods that the networks do <u>not</u> program. If networks dominated their affiliates, affiliates would not be rejecting network daytime offerings, as they in fact do. Indeed, as of the beginning of this year, the three original networks offered 25 fewer hours of non-prime time programs each week than they did in 1977. This decline in network program time reflects the affiliates' decision to choose alternative programming, which they deemed to be more desirable than what the network had to offer. These poor clearances undermined the economic viability of many network program hours, and they disappeared from the networks' schedules. (<u>An Economic Analysis of the Prime Time Access Rule</u>, <u>supra</u> at p. 23 and Table D-2).

NBC, because of non-clearance by affiliates, has itself had to reduce its program offerings to its affiliates on weekdays between 9 a.m. and 6 p.m. ET by one-third, from 30 hours in 1975 to 20 hours in 1995. Even offering fewer hours, clearance by affiliates of NBC's daytime programming has gone down from 97% of U.S. television homes to 87% (Nielsen Television Index, May I of each year). Moreover, many of these clearances are not "live," but are broadcast on a delayed basis at much less attractive times. In a recent week in October, 1995, only 23 NBC affiliates carried all 20 hours at their "live" times, and only 112 carried all 20 hours regardless of broadcast time.

If NBC and the other networks could "control" their affiliates' program choices, they would have "forced" them to clear programs they did not want, or at least insist on live clearances. Obviously, networks do not have that power, and must accept that many affiliates want to clear their programs in other than the "live" time periods, if at all. And networks today do lose the competition and give up the field to other programmers.

As in every contractual situation, when a network and a station enter into an affiliation agreement each could be said to curtail some future independence in order to obtain the benefits it sought. In program supply arrangements, whether network or syndicated, the station enters into the agreement because it wants the program service the supplier offers, and therefore "curtails its independence" by agreeing to carry it. Similarly, the program supplier wants exposure for its programs on that station as well as the revenue it will derive from that exposure, and therefore agrees to "curtail its independence" by supplying the programs to that station on the particular terms agreed to. Such terms are worked out between the parties in a marketplace negotiation, with each party exercising its own best judgment as to what to concede in order to obtain the benefits it seeks. An agreement to "curtail one's independence" does not mean that the other party is dominant.

Of course, in any single market, a particular network or a particular station may have more "bargaining power" than the other. But that is true of any commercial negotiation, and is not a reason for the government to step in and interfere in the negotiation process. As the Notice correctly states, "That is not to say, however, that such a bargaining advantage constitutes undue market power and would have a sufficient effect on programming available to the public to justify government intervention" (¶ 13).

With these considerations in mind, we now discuss each of the specific rules addressed in the Notice.

IV. <u>THE RIGHT TO REJECT RULE (Section 73.658(e))</u>

This rule forbids a station from entering into a contract that does not permit it (a) to reject network programs the station reasonably believes to be unsatisfactory, or unsuitable or contrary to the public interest, or (b) to substitute a program the station believes to be of greater local or national importance. The purpose of rule is to ensure "that licensees retain sufficient control over their stations to fulfill their obligation under the Communications Act to operate in the public interest" (Notice, ¶21).

Local stations obtain programming from four potential sources: a national network; a national syndicator; a local outside producer; and its own local productions. With respect to all four program sources, it is clear as a matter of fundamental Commission policy that the licensee retains ultimate responsibility for deciding what to broadcast on its station. But the right to reject rule regulates the contractual provisions between a station and only one of its suppliers: a national network. Logically, if a government rule is necessary to guarantee a licensee's ultimate responsibility for what it broadcasts, it should apply to all program suppliers with which a station contracts, and there would be no need for a rule that applies to only one source.

On the basis of policy and precedent, it should no longer be necessary to have a rule that explicitly and exclusively governs a television station's right to reject the programs offered by its network. First, no one questions that the ultimate responsibility to determine what programming is in the public interest rests with the individual station licensee. That principle is so ingrained in Commission policy that a specific rule preserving it for network affiliates is superfluous and unnecessary. Second, as noted above, there is no relevant difference today between television licensees and radio licensees, who have been free of this rule since the mid-1970's, without any detriment to the public interest. Third, since the competitive marketplace ensures that no television network can "control" its affiliates' programming decisions, there is no reason to have a rule that applies only to networks, but to no other program supplier with which stations contract.

Networks and their affiliates should be able freely to negotiate the terms of program carriage in a manner that recognizes the station's licensee responsibility to its local community and the network's need for sufficient clearances to support the enormous cost of programming. The balance between these two requirements can easily be struck in private, market-driven negotiations between networks and stations. The Commission should not be sitting at the negotiating table, tying the parties' hands with outdated and unnecessary restrictions.

Both the option time and right to reject rules for radio stations were expressly repealed in 1977 as unnecessary and